In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1034

JAMES A. MOREAU

Versus

RICHARD A. TONRY, THE FIRST CONGRESSIONAL DISTRICT OF DEMOCRATIC EXECUTIVE COMMITTEE AND HONORABLE PAUL J. HARDY SECRETARY OF STATE OF LOUISIANA

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS

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Pursuant to Rule 16(1)(b) of the rules of this Court, the appellees move herein that the appeal be dismissed.

STATEMENT

This is an appeal from the Supreme Court of Louisiana which upheld the dismissal of the election contest suit brought by Mr. Moreau concerning the primary election for United States Representative from the First Congressional District in Louisiana.

On October 2, 1976, the second primary was held for the Democratic nomination for the seat in the United States House of Representatives for the First Congressional District of Louisiana. Following that election, the Secretary of State of Louisiana certified Richard A. Tonry as the Democratic nominee because the commissioners' tally sheets forwarded to the Secretary of State reflected that Richard A.

Tonry had received three hundred and sixty-two (362) more votes that James A. Moreau. James A. Moreau brought an election suit pursuant to La. R.S. 18:364 asserting that but for fraud and irregularities he would have been the nominee and was in fact the nominee by reason of the legal vote cast. Moreau claimed that in fifteen precincts in the Parish (County) of St. Bernard, a total of 649 fraudulent votes were cast. In addition, Moreau asserted that in thirteen of the same fifteen precincts in St. Bernard there were a total of 795 illegal votes cast. Moreau then asserted that the subject precincts were controlled by commissioners appointed by Richard A. Tonry and that, threfore, the Court should find that the total of alleged illegal votes of 795 should be deducted from Richard A. Tonry's lead of 184 and that James A. Moreau should be declared the Democratic nominee. In the alternative, James A. Moreau prayed that if the specific fraudulent votes could not be identified the election should be voided because of widespread fraud and irregularity.

The matter was tried before Louisiana District Judge Melvin Shortess and a decision rendered on October 15, 1976. The District Court found no basis for voiding the election. The District Court found that there were 43 illegal votes cast in favor of Defendant Tonry and reduced his majority of 184 by that amount. The Court then found that there was no further substantial credible evidence to indicate either additional illegal votes or their attribution to Defendant Tonry and therefore held that Tonry still had a majority of the legal votes cast and dismissed plaintiff's case.

The Louisiana Court of Appeal, sitting en banc, unanimously annulled the decision of the District Court and set aside the election. The appellate court found a total of 43 forged votes but found they were not attributable to either

candidate. They further found that 315 illegal (though not fraudulent) votes were cast. The Court, however, could not attribute these votes to Tonry, and therefore, did not declare Moreau the winner.

The Louisiana Supreme Court reversed the Court of Appeal and reinstated the judgment of the District Court, dismissing plaintiff's suit. The Court found that Mr. Moreau could not prove that "but for" the irregularities plaintiff would have won. Further, under the alternative standard, the Court found that here the proven frauds were not of such a serious nature that the voters had been deprived of a free expression of their will. The Court finally stated that the irregularities found by the Louisiana Court of Appeal were not so pervasive that the election had to be nullified.

The plaintiff then changed his posture from candidate to elector and brought suit in Federal Court pursuant to 42 U.S.C.§ 1983 for deprivation of rights under the Fourteenth Amendment to the United States Constitution and under the Civil Rights Act of 1965, making the same allegations as in the state court suit. This suit was dismissed for lack of jurisdiction and/or failure to state a claim pursuant to F.R.C.P. Rule 12(b). A second federal suit was filed, identical to the first except that it was styled as a class action on behalf of all those who cast their votes for Moreau in the primary.

The District Judge refused to grant defendants' Motion to Dismiss in the second federal court case but did certify questions to the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1292(b).

Before the Fifth Circuit had an opportunity to hear and

decide the orders on appeal, plaintiff applied to this Court through Justice Powell, Circuit Justice, to vacate the stay of the Temporary Restraining Order issued by the District Judge, which prohibited the Secretary of State from certifying Tonry as United States Representative from the First Congressional District of Louisiana to the House of Representatives. This application was summarily denied, No. A-384, on November 12, 1976. A second application for a stay requesting similar relief and asking that this Court remain and order an immediate hearing in the District Court, was similarly denied on December 6, 1976.

On January 26, 1977, the United States Court of Appeals for the Fifth Circuit heard argument on the certified questions from the District Court. The court has not yet, however, rendered an opinion on the matter.

ARGUMENT

THIS CASE IS NOT PROPERLY PRESENTED FOR APPEAL NOR CERTIORARI PURSUANT TO 28 U.S.C. §1257 BECAUSE THE FEDERAL CONSTITUTIONAL ISSUES WERE NEITHER RAISED IN NOR DECIDED BY THE STATE COURTS

Appellants allege that this Court has jurisdiction of this matter on appeal from the Supreme Court of Louisiana, pursuant to 28 U.S.C. §1257(2) which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

This provision has been construed to mean that an appeal as of right lies from the highest court of a state to this court if the highest court of the state passed on the validity of a state statute with respect to the United States Constitution and found such statute constitutional. *Jenkins v. Georgia*, 418 U.S. 153 (1974). *Hicks v. Miranda*, 422 U.S. 322 (1975).

While 28 U.S.C. § 1257(3) permits application for a writ of certiorari from the highest court of a state to this court, we note that this provision requires that the Federal constitutional issues be raised in the state courts. As this Court stated in *Tacon v. Arizona*, 410 U.S. 351, 352 (1972): "We cannot decide issues raised for the first time here. . ."

Plaintiffs admit that they failed to raise the federal constitutional issues in the state courts. (Jurisdictional Statement at p. 7). They claim, however, that they could not have anticipated that the Supreme Court of Louisiana would have interpreted R.S. 18:364 as it did. Further, they note that they could not have applied for rehearing as such is precluded by the Election Contest Law of Louisiana (Jurisdictional Statement at p. 6).

Defendants contend, and can show, that the interpretation herein of R.S. 18:364 by the Louisiana Supreme Court was consistent with the interpretation of said statute in prior jurisprudence. In addition, the statute provides for a reconsideration in order that the Court "may correct manifest errors to which their attorneys may be called."

INTERPRETATION OF R. S. 18:364 BY THE LOUISIANA SUPREME COURT WAS CONSISTENT WITH THE INTERPRETATION OF SAID STATUTE IN PRIOR JURISPRUDENCE

Petitioner contends that the Louisiana Supreme Court decision, reversing the Court of Appeals and reinstating the judgment of the District Court, constituted a new and wholly unforseeable interpretation of R.S. 18:364, and that therefore the challenge to the statute's constitutionality may be raised for the first time in petition for appeal to the United States Supreme Court. Petitioner further contends that because no application for rehearing is permitted under R.S. 18:364, he has no alternative but to petition this Court. For reason specified below, there is no merit to either of these arguments.

In maintaining that the Louisiana Supreme Court decision contravened the well established jurisprudence in the state, and therefore could not possibly have been anticipated, petitioner relies totally on two cases: *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So. 2d 755 (1958), and *Lacaze v. Johnson*, 310 So. 2d 86 (La. 1974). In so doing, petitioner not only manages to overlook the case most pertinent to the issue in question, *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So. 2d 292 (1957).

In *Lewis*, the plaintiff challenged the official results of a primary election for Mayor of Eunice, Louisiana, showing that he had received a total of 2043 votes to his opponent's 2075 votes. The plaintiff contended that various irregularities and illegal acts occurring during the election in one of the voting polls had deprived him of the nomination.

The Louisiana Supreme Court pointed to the Primary Election Contest Law (R.S. 18:364), which gives the Courts the power to declare a plaintiff the victor where he is able to prove that "but for" fraud and irregularities he would have received a majority of the legal votes case. However, the Court states:

> ". . . it has been recognized as an alternative proposition that, in the event the court finds that the frauds and irregularities alleged and proven are of such a grave nature so as to deprive the voters of the free expression of this will, it will annul the primary and order the holding of another election." (citation omitted)

The Court, in a detailed analysis of the alleged infractions, concluded that "substantial" irregularities had indeed occurred. Nevertheless, the Court maintained that the various infractions fell "far short" of justifying annulment of the election. The Court stated:

> "For this Court to render such a drastic order, there must be clear showing that a course of fraudulent conduct was employed which effectually prevented the electors from expressing their will."

In other words, sufficient evidence must exist showing that a substantial number of votes were cast illegally, and that more than an insignificant few of these were cast in a fraudulent scheme to fix the election results. As the Louisiana Supreme Court stated in the instant case, while an election might be nullified "for widespread fraud which cannot

be proved to supply the winning margin," pervasive fraud on behalf of a particular candidate must nevertheless be shown to have occurred. This is the clear and unmistakable message of *Lewis*.

Niehter *Dowling* nor *Lacaze* break with the Lewis analysis. In *Dowling*, the plaintiff had lost his bid to be elected District Attorney of Orleans Parish by a bare nine vote margin. The majority found that seventeen votes were not only illegally but also fraudulently cast for the defendant. Fraud was inferred in this case because it was determined that the seventeen votes could have been cast only with the complicity of the commissioners assigned as supervisors, all of whom were supporters of the defendant, and wore buttons so signifying at the polls. The Court declared the plaintiff, *Dowling*, the winner. In the Court's judgment, the circumstantial evidence was strong enough to justify the conclusion that "but for" the perpetrated fraud *Dowling* would have received the majority of votes.

Thus, *Dowling* falls under the first of the two alternative propositions recognized in *Lewis*. There was no suggestion by plaintiff in *Dowling* that vote fraud permeated the whole election. Rather, unlike the present controversy, the case dealt with an isolated instance of fraud which, at least by inference, established the plaintiff as the clear victor.

Plaintiff states:

> "The significance of the case, so far as the issue here is concerned, lies in the unanimous agreement of all members of the court, that the very least that should have been done was to nullify the election."

This statement is plainly inaccurate. Nowhere in the Court's opinion is there language indicating or even implying that nullifying the election was an appropriate remedy in the absence of evidence that fraud directed toward promoting the defendant's chances of winning permeated the primary.

Lacaze is no more on point than *Dowling*. *Lacaze* did not involve fraud at all, but rather was based on a claim that the malfunctioning of one voting machine upset the election results.

Unfortunately, because the majority issued no opinion in the case, but simply denied writs, there is no way of definitely determining whether the absence of alleged fraud was the critical factor in the court's decision to nullify the election. However, there is good reason to believe that this may very well have been the rationale. To nullify an election because of fraud creates risks that simply don't exist where a contest is declared invalid subsequent to a serious but innocent mechanical malfunction. As the Supreme Court stated in *Landry v. Ozenne*, 195 So. 23, 194 La. 853 (1940), a case involving multiple charges of fraud:

> "There is nothing in plaintiff's allegations that any defeated candidate could not set up after his defeat and thereby throw an election into the courts. If this were permitted it is easy to see that in every case in which a candidate was defeated by a small margin of the votes, two elections would inevitably be held -- one at the polls and the other in the courts."

Clearly, what the Courts are attempting to prevent is a

situation where one candidate having benefitted from the perpetration of fraud by his supporters, should succeed in having the election nullified on the ground that fraud was committed. As the Supreme Court stated in the instant case:

> "The solution adopted by the Court of Appeal is innovative, and not necessarily productive of fair elections. The candidates are removed from the reach of the lawful election machinery, *even though neither has been found responsible for fraud and irregularity*, and neither can be held the winner "But for" the irregular votes. [Emphasis added.]

Thus, in summation, not only has Plaintiff Moreau failed to establish his claim that the Louisiana Supreme Court's refusal to invalidate the election results of the October 2, 1976 primary between James A. Moreau and Richard A. Tonry was thoroughly inconsistent with previous rulings by the Court under La. R.S. 18:364, but he has failed even to provide this Honorable Court with one case supporting his contention of inconsistency. Therefore, the argument that plaintiff's constitutional rights have been impinged by the construction given to R.S. 18:364 for the first time by the Supreme Court of Louisiana is totally without merit.

PLAINTIFF WAS AFFORDED THE OPPORTUNITY UNDER THE ELECTION CONTEST LAW TO PETITION FOR A REHEARING

Plaintiff's claim that petitions for rehearing are not permitted under the Election Contest Law of Louisiana is only partially accurate. R.S. 18:364(G) provides in part:

> "No application for rehearing shall be entertained by any court, but the courts may upon their own motion correct manifest errors to which their attention may be called."

The Courts of Louisiana have defined "manifest error" as error which is "evident, apparent, clear, visible, unmistakable, and indisputable." *State Department of Highways v. Moity,* 276 So. 2d 770, 773 (La. App. 1973); *Norman v. State,* 69 So. 2d 120, 131 (La. App. 1953).

Plaintiff's appeal before the Court is founded on the argument that the decision by the Louisiana Supreme Court was so blatantly inconsistent with previous Court rulings as to be manifestly erroneous. On this basis, however, plaintiff could have asked the Louisiana Supreme Court for a rehearing of the case by calling to that Court's attention the "manifest error" based on the constitutional grounds now asserted here for the first time. It is well settled that this Court will refuse to decide issues raised for the first time here on appeal. *Tacon v. Arizona,* 410 U.S. 351 (1972); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940). Thus, defendants submit that plaintiff has no right of appeal under 28 U.S.C.§ 1257(2).

CONCLUSION

It is respectfully prayed that plaintiff's appeal under 28 U.S.C. § 1257(2) should be denied for the several reasons discussed above.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing same to each properly addressed and postage prepaid on this 18th day of February, 1977.

JOHN R. MARTZELL